

JUN. 13. 2000 2:03PM D E O
JUN-13-00 01:36PM From: MT DEPT OF ENVIRONMENTAL QUALITY
4105314233;
Sent by: W R GRACE

40E4444566 NO. 869 7-824 P. 04/11 P. 010
06/10/00 12:00 PM JUNE 10 2000

Holme Roberts & Owen LLP

SDMS Document ID



2002523

June 9, 2000

Matthew W. Zund
(303) 868-0400
jzund@hro.com

Max Dodson
Assistant Regional Administrator

Matthew Cohn, Esq.
Senior Enforcement Attorney

United States Environmental Protection Agency
Region 8
999 18th St., Suite 500
Denver, CO 80202

Re: Libby, Montana Asbestos site: Comments Regarding Unilateral
Administrative Order for Removal Response Activities

Attorneys at Law

7700 Lincoln Street
Suite 1700

Denver, Colorado

10008-4543

Tel (303) 867-7000

Fax (303) 866-8800

www.hro.com

Denver

Salt Lake City

Bozeman

Colorado Springs

London

Dear Messrs. Dodson and Cohn:

W.R. Grace & Co. (Grace) has received EPA's Unilateral Administrative Order For Removal Response Activities (UAO), dated May 24, 2000. EPA states it issued the UAO to "abate an imminent and substantial endangerment to the public health, welfare, or the environment" at Grace's former Export Plant in Libby, Montana. However, the data and information compiled by EPA, even applying EPA's own standards, provide no scientifically defensible, risk-based rationale for the removal actions prescribed by the UAO, particularly the soil removal and building decontamination. Additionally, EPA has not shown that the presence of vermiculite in bags or on the ground surface is a toxicological concern. EPA has provided only anecdotal evidence of health issues relating to past exposures involving vermiculite processing and no evidence that the mere presence of expanded or unexpanded vermiculite is itself a health threat.

Although Grace disagrees with EPA's characterization of the situation, Grace intends to comply with the UAO and has so stated by letter dated June 5, 2000. The following points are intended to clarify Grace's concerns regarding the work required by the UAO and provide a clear record of the issues discussed at the June 2, 2000 meeting.

501 0269

- 1) ~~Good STP~~
- 2) ~~not S. de~~
- 3) ~~Risk Ass~~
- 4) ~~Assessment~~
- 5) ~~more info~~
- 6) ~~No correction~~
- 7) ~~Dust Generation~~
- 8) ~~Risk of Ex & Fr~~
- 9) ~~not data~~
- 10) ~~Look of conditions at site~~
- 11) ~~not actually occurring~~
- 12) ~~model for UAO~~
- 13) ~~Risk Ranges~~
- 14)

JUN. 13. 2000
JUN-13-00 01:57PM
W R GRACE

2:03PM D E Q
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EPA's soil removal decision is arbitrary and capricious.

The UAO requires Grace to undertake a massive soil excavation project at the Export Plant on the basis of an unsupported hypothesis that asbestos-contaminated soil is a potential source of inhalation exposure at the site. No ambient air data supports this theory, nor is there any modeling evidence to demonstrate potential inhalation exposure routes from soil contamination. Since EPA used the wrong method for analyzing asbestos in Export Area soils, EPA is unable to estimate inhalation risks related to soils at the site. Instead, it is apparent that EPA relied entirely on results of indoor air monitoring and a weak referral to results from studies done in California and by Addison in Scotland to justify the UAO's massive soil removal requirements. The indoor air data utilized by EPA at this site has no relation to potential inhalation risks posed by Export Area soils. The California studies involve vehicular traffic on serpentine gravel containing chrysotile, not actinolite-tremolite. Addison's studies involve extended aerosolization of dust spiked with free amphibole asbestos fibers, not an intimate mix of only partially liberated fibrous and non-fibrous amphiboles in vermiculite containing rock. EPA's reliance on very limited indoor air monitoring and dust generation studies with vastly different conditions to justify the excavation and disposal of 25,000 cubic yards of soil at the site is completely arbitrary and scientifically indefensible.

To the extent that soil analysis may be relevant, the data compiled by EPA is insufficient. EPA's undifferentiated, weight-based asbestos soil data are of no value in making risk-based removal decisions.¹ Without additional, detailed site-specific information regarding the abundance, morphology, respirability or mineralogy of free asbestos fibers - which is completely lacking in the existing soil data - EPA cannot make a scientifically defensible risk-based decision. In this instance, EPA has ignored its own procedures and methods. In their document titled, "Superfund Method for the Determination of Releasable Asbestos in Soils and Bulk Materials" (EPA, 1997) EPA correctly noted that

¹It should also be noted that the vast majority of soil samples showed either no detectable asbestos fibers or only trace quantities.

Drift method
not required
supports risk assessment
does not correlate

Not true

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NO (it doesn't
not for removal)

"[t]he statutory requirements of the Superfund program mandate that risk management decisions be based on risk assessment. Risk assessment requires that analytical data be reliable to health effects [and]...if asbestos measurements are to be related to risk, it is necessary to characterize the sizes, shapes and mineralogy of the asbestos in each sample." (emphasis in original)

Chunks make
fibers

EPA's analysis of these samples then disregarded the fact that much of the asbestos contained in site soils consists of weathered tremolite, which breaks off in large soft chunks that are too large to be respirable. Thus, weathered tremolite does not present the potential health risk posed by the hard rock asbestos that releases tiny, potentially respirable fibers into the air when crushed.

agree
150-16312
bott

not hard
observed to
be very
friable - kids
breaking chunks
into asbestos
if it's soft

Perhaps even more disturbing than the lack of scientific basis for the removal decision is EPA's failure to consider the risks created by excavating and transporting 25,000 cubic yards of allegedly contaminated soil through residential areas of Libby and other populated areas en route to the ultimate disposal site. Grace has calculated that off-site disposal will require nearly 1700 truck loads potentially traveling up to approximately 34,000 cumulative miles if disposed of near Libby, and 510,000 cumulative miles if the final resting place is in Spokane. The risk of human exposures resulting from disturbing and excavating nine acres of soil, along with the very real risks associated with transporting such a huge volume of materials may be significant, but do not appear to have even been considered by EPA. Further, the UAO does not indicate that EPA has considered less risky alternatives. Capping, for example, would be a far safer and more economical removal option. It would completely eliminate the excavation and transportation-related risks while directly addressing EPA's concerns about soil contamination as a potential pathway for inhalation risk.

S-X

V-S. 1.77
of 5000
C-1000

EPA used inappropriate methodology to calculate the potential risk presented by asbestos in buildings and soils.

EPA used insufficient and inappropriate data to support the finding of an imminent and substantial endangerment presented by asbestos in buildings and soils at the Expor Plant. The EPA sampled indoor air from five different buildings in the Expor Plant area. The total volume of air sampled was over 20,000 liters. Even after sampling such a tremendous volume of air, not one fiber

not clear
sampled
show fibers
as well

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greater than 40 microns in length with a diameter of less than 0.5 microns was detected. It is these fibers that are thought to contribute most significantly to risk following inhalation exposure (Berman et al., 1995; Berman and Crump, 1999). According to Berman and coworkers (Berman et al., 1995), fibers greater than 40 microns in length (and less than 0.5 microns in width) are about 500 times more potent than structures between 5 and 40 microns in length. In fact, in the 20,000 liters of air monitored by EPA, only three actinolite fibers between 5 and 40 microns in length (and less than 0.5 microns in width) were detected in the indoor air samples. Our own TEM monitoring conducted concurrently with EPA's found no such fibers at all in the indoor air sampling at the Export Plant.

Thus EPA's own air monitoring data and our data not only do not support their finding of imminent and substantial endangerment, they actually contradict this finding. With this paltry number of fibers it is entirely inappropriate to calculate a risk at all.

Furthermore, it was entirely inappropriate for EPA to use the results of indoor air sampling at this site to justify the removal of area soils.² The only air samples presented by EPA in justification for their determination were obtained from inside buildings historically used for processing and/or storage of vermiculite. These historical uses may have contaminated indoor dusts with asbestos fibers. To use the air monitoring data from inside a building with potentially asbestos-contaminated dusts to support a finding of imminent and substantial endangerment to people outside the building is entirely inappropriate. In fact, our own analysis of EPA's community air data reveals that out of dozens of samples, only two contained fibers that were greater than 5 microns in length and less than 0.5 microns in width. None of the samples contained the high risk (i.e., greater than 40 microns in length and less than 0.5 microns in width) asbestos fibers. Thus, EPA has not produced any community air data to support their assertions of "actual or potential exposure to nearby human populations." In reality, the only "evidence" produced by EPA to support this finding of

² We also dispute that EPA's indoor air sampling results justify the other requirements of the UAO including building decontamination and vermiculite removal.

Sampling should have been conducted with no activity (which shows that) Down during wet time of year, not designed to support Risk Ab.

workers, construction

Population on Both Sides, Results confirm workers

JUN. 13. 2000
JUN-13-00 11:56PM
ent by: W N UNALC

2:05PM D E O
FROM: MT DEPT OF ENVIRONMENTAL QUALITY

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NO. 869 P. 6/9
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imminent and substantial endangerment with respect to soils is the undisputed fact that there is asbestos in the soils of the Export Area. In fact, the presence of naturally-occurring asbestos in soils is a condition that exists at a large number of sites around the country. However, as shown by EPA's own data, the mere presence of asbestos in soils or the mere presence of bagged or surficial vermiculite does not mean that "nearby human populations" are in fact being exposed to significant levels of this substance.

not to say
naturally occurring
from the

Finally, consistent with our previous comments regarding EPA's inappropriate use of air monitoring data, it is also important to note that the data they did use were not analyzed appropriately. It is entirely inappropriate to use ISO method 10312-obtained data to compare with non-ISO method 10312-derived risk levels. The NIOSH 7402 and ISO 10312 methods use entirely different counting criteria. As a result, the ISO method 10312 method inflated the asbestos count of the samples EPA collected at the site. For example, as previously noted, the samples we analyzed using TEM with NIOSH method 7402, found no fibers greater than 5 microns in length and less than 0.5 microns in width in the five indoor air samples obtained by EPA. Moreover, to our knowledge, no standardized methodology to convert ISO 10312-based fiber counts to PCM equivalents has been developed or peer-reviewed. As a result, by using ISO method 10312 to change the method of counting airborne fibers and using these inflated counts to calculate risk using risk factors based on PCM measurements, EPA has effectively raised the standard against which the hazard is measured. Such a change is inconsistent with EPA's own science policy and, if uncorrected, threatens to undo years of risk management decisions made with respect to asbestos-containing materials. Perhaps this consequence escaped EPA's notice, but in other contexts, such as complying with a regulatory standard, the courts have refused to allow EPA changes in sampling and analysis techniques to be used as a backdoor means of raising regulatory standards. See, e.g., *Appalachian Power Co. v. EPA*, No. 98-1512, (D.C. April 14, 2000) (courts have recognized that "changing the method of measuring compliance with an emission limitation can affect the stringency of the limitation itself") (*clining Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 396-97 (D.C. Cir. 1973), discussed in *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1203 (D.C. Cir. 1998)).

only
slight diff
either ok

PCM
not needed

may be
value
risk
not required

442-6606

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EPA's endangerment finding is unfounded.

To support an action to abate an imminent and substantial endangerment, "the endangerment must be substantial or serious and there must be some necessity for the action." *Price v. U.S. Navy*, 39 F.3d 1011, 1019 (9th Cir. 1994) (interpreting substantially similar provisions of RCRA § 7002). EPA typically bases a Section 106 endangerment determination upon a risk assessment.¹ That was not done here. Instead, the issuance of the UAO was based on something EPA euphemistically terms a "risk estimate," which is apparently far less rigorous than a traditional EPA risk assessment.

Even assuming, *arguendo* that EPA has properly estimated the cancer risks, these risks do not exceed the range of risks that EPA has deemed acceptable. In his analysis, EPA's Dr. Weis concludes that the risk levels associated with the airborne fibers identified in indoor air at the Export Area are within a range between 3.0e-5 and 9.0e-5. Table 3, Memorandum from Christopher P. Weis to Paul Peronard, dated May 17, 2000. While Grace disagrees with Dr. Weis' conclusions, risks of approximately 10⁻⁴ fall well within the 10⁻⁴ and 10⁻⁵ range of remediation goals EPA has established under the National Contingency Plan. See 40 CFR § 300.430(c)(2)(i)(A)(2). EPA thus has no risk-based rationale for requiring a removal action at the Export Area.

Much of the work proposed is unnecessary and arbitrary.

Certain items of the specific work required by the UAO's Scope of Work go beyond what is authorized by CERCLA and the NCP for a removal action. The UAO, together with its Scope of Work, essentially catalogues EPA's "wish list" of all the activities it would like to see done at the site, regardless of whether they have any scientific or legal basis.

¹The annotations to EPA's Model Unilateral Administrative Order for Removal Response Activities specifically recommend that the finding of an imminent and substantial endangerment be supported by a risk assessment. OSWER Dir. No. 9633.07, Model Order at 2 (March 16, 1993).

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Section 106 of CERCLA provides EPA with authority to issue orders "as may be necessary to protect public health and welfare and the environment." 42 U.S.C. § 9606(a). Although admittedly broad, EPA's Section 106 authority is limited in that it is *injunctive* in nature. See, e.g., *United States v. Outdoor Marins*, 536 F. Supp. 54, 54-55 ("the Government seeks injunctive relief under Section 106(a) of [CERCLA]").⁴ Nevertheless, under the guise of "temporary relocation and property restoration," the UAO purports to require Grace to pay money damages as compensation to the site owner and lessee.⁵ This attempted expansion of EPA's authority is not authorized under Section 106⁶ and violates Due Process.

The UAO grants the OSC unfettered discretion to determine whether demolition, rather than decontamination, will be used to address potential contamination of on-site structures. The Scope of Work even goes so far as to require demolition and off-site disposal of *uncontaminated* concrete foundations and slabs. Demolition is *never* the preferred remedy for asbestos-contaminated structures due to the substantial release and exposure risks presented by the demolition process. Decontamination and encapsulation should be used to address potentially contaminated structures unless those procedures prove cost

⁴See also OSWER Dir. No. 9835.111-1, Model Litigation Report for CERCLA Sections 106 and 107 and RCRA Section 7003(6/21/89) (CERCLA Section 106 cited for authority for injunctive relief under CERCLA) at 26; Guidance on CERCLA § 106(a) Unilateral Administrative Orders (EPA Jan. 31, 1990), 20 ELR 35253 (Oct. 1990) (Appendix A, "Administrative and Judicial Settlements and Unilateral Enforcement Authority") at 35259.

⁵The UAO also refers to DOT FEMA regulations which apply only to relocation activities conducted by the *federal* government, not private parties. Also please note that these FEMA regulations are now found at 49 CFR Part 24, not 44 CFR § 220.

⁶See also *United States v. Wade*, 546 F. Supp. 785, 793-94 (E.D. Pa. 1982) (Section 106 cannot be used to impose response costs on a PRP).

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prohibitive. The decision to demolish should be based upon cost/benefit analysis alone, and should not be left to the whim of the OSC.

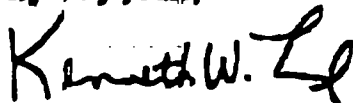
The UAO also arbitrarily requires Grace to prepare the site for paving. This task is entirely unrelated to any remedial purpose under CERCLA and is inconsistent with the present condition of the property. Similarly, the UAO also requires Grace to finish elevations, lines and grades "to conform to the wishes of the current landowner" or "as determined by EPA and the property owner." CERCLA does not require PRPs to embark on third-party property improvement projects dictated by EPA. To the extent restoration of the property is appropriate, such restoration should be exactly that and no more. These requirements are utterly arbitrary and wholly unrelated to protection of human health or the environment.

The UAO's requirement that Grace use DataRam™ portable real time monitors is overly-prescriptive, unjustified and unnecessary. Far more economical methods of monitoring exist that are approved by EPA.

Conclusion

As discussed above, it is Grace's position that EPA's issuance of the UAO and the elements of work required thereunder are unnecessary and based upon insufficient data and flawed technical methodologies. While Grace intends to comply with the UAO, the Company hopes that EPA will give careful consideration to these comments in the implementation of the order. If you have any questions concerning the contents of this letter, please do not hesitate to contact me.

Very truly yours,



Kenneth W. Lund

cc: David M. Cleary